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Supreme Court of the United States

No. 541

G. C. ROWE, ANDY REYNOLDS, GRACE REYNOLDS, MILES REYNOLDS, POLLY REYNOLDS, ALEX REYNOLDS, JESSEE REYNOLDS, SARY REYNOLDS, W. M. JUSTICE AND TOBITHA JUSTICE ..... Appellants

V.

CHESAPEAKE MINERAL COMPANY ..... Appellee

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

PETITION FOR REVIEW ON WRIT OF CERTIORARI

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Supreme Court of the United States

G. C. ROWE, ANDY REYNOLDS, GRACE REYNOLDS, MILES REYNOLDS POLLY REYNOLDS, ALEX REYNOLDS, JESSEE REYNOLDS, SARY REYNOLDS, W. M. JUSTICE AND TOBITHA JUSTICE ..... **Appellants**

V.

CHESAPEAKE MINERAL COMPANY ..... **Appellee**

I

STATEMENT OF MATTER INVOLVED

The matter involved in this action is the title to the oil and gas underlying approximately eleven hundred (1100) acres of land in Pike County, Kentucky. The deed under which both the appellants and the appellee claim title to the oil and gas is dated October 14, 1887 and was executed by William H. Reynolds and others to John J. Stuart, Trustee. It was on a printed form.

The printed form contained the words "coal, salt water, oil, gas and mineral" in three places, i.e., the granting clause, the habendum clause and the warranty clause.

The words "salt water, oil, gas" were struck out by a pen line drawn through them in the deed as executed. In recording the deed, the clerk disregarded the deleted words and as recorded on the clerk's record, the instrument reads "coal, and mineral" in all three places where the deletion occurs.

The appellants claim title to the substances embraced by the deleted words "salt water, oil, gas" by inheritance or mesne conveyances from the grantors of the deed of 1887.

The appellee claims title to these substances by mesne conveyances from the grantee, John J. Stuart, Trustee.

II JURISDICTIONAL STATEMENT

The jurisdiction of this Court is sought pursuant to the provisions of Title 28, U. S. C. A., Section 347-(a). The judgment sought to be reviewed was rendered by the United States Circuit Court of Appeals, Sixth Circuit, Action No. 10094, in that Court, on July 8, 1946, and appears on pages 217 to 223 of the printed record of the proceedings in that court, and the United States District Court for the Eastern District of Kentucky.

Original jurisdiction in the United States District Court for the Eastern District of Kentucky was based upon diversity of citizenship and an excess

of $3,000.00 involved under the provisions of Title 28, U. S. C. A., Section 41 (1, a), all of the appellants being citizens and residents of the Commonwealth of Kentucky, and the appellee being a corporation domiciled in the State of New Jersey.

III QUESTIONS PRESENTED

The questions presented are as follows:

Where the words "salt water, oil, gas" on a printed form of mineral deed reading "coal, ~~salt water, oil, gas~~ and mineral" are struck out by drawing an inked line through those words as indicated in the three places where they appear in the printed form, i.e., the granting clause, the habendum and the warranty clause, and the deed is recorded without showing this deletion so as to read "coal, and mineral" in each place.

QUESTION 1.

Did the grantors intend to convey the "salt water, oil, gas"?

The appellant contends that it should be answered, "No."

QUESTION 2.

Where the deed as recorded does not show this deletion, did an innocent purchaser for value without notice of the fact that the deleted matter "salt water, oil, gas" had been so struck out acquire title to the salt water, oil and gas?

The appellants contend the answer should be "No."

This question turns upon the following considerations:

A. Where the deed made in 1887 conveys "coal, and mineral" followed by a description of rights granted which are limited to the "right of entry to mine said coal, and mineral, with all the usual mining privileges," and a comma appears between the word "coal" and the word "and" in one place so as to read "coal, and mineral," was there sufficient ambiguity on the face of the instrument to justify resort to extrinsic evidence and circumstances to ascertain the intention of the parties with respect to the conveyance of the liquid substances "salt water, oil, gas"?

The appellants contend the answer should be "Yes."

B. Where appellee acquired title to the minerals passed by this deed by subsequent special warranty deed embracing other tracts of minerals originally acquired by the same grantee at the same time under at least fifteen other deeds drawn on the same printed form differing only in the phrase "coal and mineral" and containing the phrase "coal, salt water, oil, gas and mineral," is that sufficient to put the grantee upon inquiry as to why the words "salt water, oil, gas" did not appear in the deed in question?

Appellants contend the answer should be "Yes."

C. Where the only consideration moving from the grantee for the minerals covered by its special

warranty deed was the construction of a railroad, was there sufficient "valuable consideration" for the minerals other than coal to constitute the appellee an innocent purchaser for value without notice?

Appellants contend the answer should be "No."

QUESTION 3.

Is there an equitable estoppel in pais against the grantors and those claiming under them to deny title to the "salt water, oil, gas" asserted by the appellee as innocent purchaser for value without notice where there is no plea of estoppel and no proof offered in support thereof, upon the theory that the grantors, by failing to exclude and reserve these substances by specific words, rather than deletion, were guilty of negligence amounting to constructive fraud?

The appellants contend the answer should be "No."

IV THE REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

(1) The appellants contend that the Circuit Court of Appeals for the Sixth Circuit entirely disregarded the finding of fact by the United States District Court to the effect that the grantors in the deed of 1887 did not intend to convey the "salt water, oil, gas."

The District Court in its opinion said:

"From the appearance of the instrument it

is clear to me that the grantors in the deed of October 14, 1887, expressly intended to reserve the salt water, oil and gas, and to assist them in carrying out this intention, the grantee, or his agent, struck out the words, "salt water, oil, gas" by drawing a line through them. All of the other grantors of the mineral rights used the printed forms of deeds, which were provided for them by the grantee, conveying all of their mineral rights including salt water, oil, and gas, but here was the special case, which stands out like a light. It is obvious that the parties here intended the unusual. It is manifest that a different kind of instrument was intended by the contracting parties. There can be no other explanation, and no evidence has been offered that can overcome this intention as presented by the written instrument.

"It is very true that in determining what this intention was the court cannot ignore the language of the instrument or imply words not used. To do so would be to substitute the court's contract for the contract of the parties. However, in determining what this intention was and in applying these rules of construction as guiding the court to the correct intention, all things which appear on the face of the instrument may be considered. T h e s e 'things' may be marks, erasures, deletions, or l i n e s drawn through words. As stated in the case of Maynard, et al v. McHenry, et al, 271 Ky. 642, it is only where the language of the grant is ambiguous that extrinsic evidence is admissable and if there are no restrictive words, a conveyance or passage of minerals will include oil and gas. I do not think that the term 'am-

biguous' should be applied to language alone but to anything which might appear from the instrument that calls for an explanation or leaves the mind in some doubt as to what the parties intended. While the opinions use the word 'language' they certainly do not mean to exclude other indications appearing on the face of the instrument.

"There is nothing ambiguous in the language here used. The ambiguity arises when the words are stricken out by a pencil or pen mark through them. The words left in and not stricken are not ambiguous, but the words stricken out with a pencil or pen are ambiguous and subject to explanation by extrinsic evidence.*****

"This is an ambiguous contract. The words put in it and then stricken out make it ambiguous. Since it is ambiguous it would be essentially unjust and unfair to ignore the fact appearing on its face. While I again call attention to the fact that the authorities in Kentucky speak of ambiguous language, I cannot conclude that they have narrowed the rule of construction to mean only language and not contract as it appears in its full context.

"As is well said in the case of Combs, et al. v. Combs, et al., 292 Ky. 445, quoting from the case of Combs v. Fields, 211 Ky. 842, 278 S. W. 137, 138, 'If the attention of the parties can be ascertained it must control. The intention is gathered from the entire instrument, giving proper effect if it can be done to each and every part, and considering all the clauses without reference to the place at which they appear in the instrument.' See also McKinney's

Heirs v. Central Kentucky Natural Gas Co. 134 Ky. 239,*****

"The question here is most difficult. It is well reasoned that since it was not the intention of the parties to convey the salt water, oil, and gas, **as I have held**, consequently no title could pass and that the title to the salt water, oil and gas remained in W. H. Reynolds, and others, at the time of the execution of the deed of October 14, 1887."

(Emphasis mine)
(R. p. 185-191)

The opinion of the Circuit Court of Appeals for the Sixth Circuit holds in effect that the deletion of these words did not create an ambiguity and that no intention to exclude oil and gas from the conveyance was evidenced by the instrument itself, contrary to the expressed finding of fact by the District Court. (See opinion of Circuit Court of Appeals for the Sixth Circuit, pages 218-223 of the record).

(2) This is a novel question. As stated in the opinion of the District Court "No similar case can be found." (R. P. 185).

The question is highly important not only because of the value of the minerals underlying the tract of land involved in this litigation, but the title to the minerals and the title to the oil and gas underlying many thousands of acres of land in Eastern Kentucky, held under similar circumstances, i.e., where the words "oil and gas" had been struck out

on a printed form, are involved and depend upon the final determination of this case.

(3) The decisions of the Kentucky Courts are in conflict upon the question of whether or not the time when a deed is made has any bearing upon what the parties intended to include within a grant of "minerals." McKinney's Heirs et al. v. Central Kentucky Natural Gas Company, 134 Ky. 239, 120 S. W. 214; Hudson and Collins v. McGuire, 188 Ky. 712, 223 S. W. 1101; Scott v. Laws, 185 Ky. 440, 215 S. W. 81.

The decisions of the Kentucky Courts are in conflict on the question of whether or not the grant of mining privileges, limited to the extraction of hard fixed substances, has any bearing upon the intention of the parties with respect to liquid or migratory minerals. See cases above cited among others.

(4) The opinion of the Sixth Circuit Court of Appeals is inconsistent in this particular. The opinion holds that the "dereliction of the clerk, if such it was, in failing to copy the deleted words and to indicate the deletion, can in no way be charged to the grantor" (R. p. 220).

Yet, the Court bases its opinion upon the theory that the appellee, as innocent purchaser for value, had a right to rely upon the record as it appears.

The Court said:

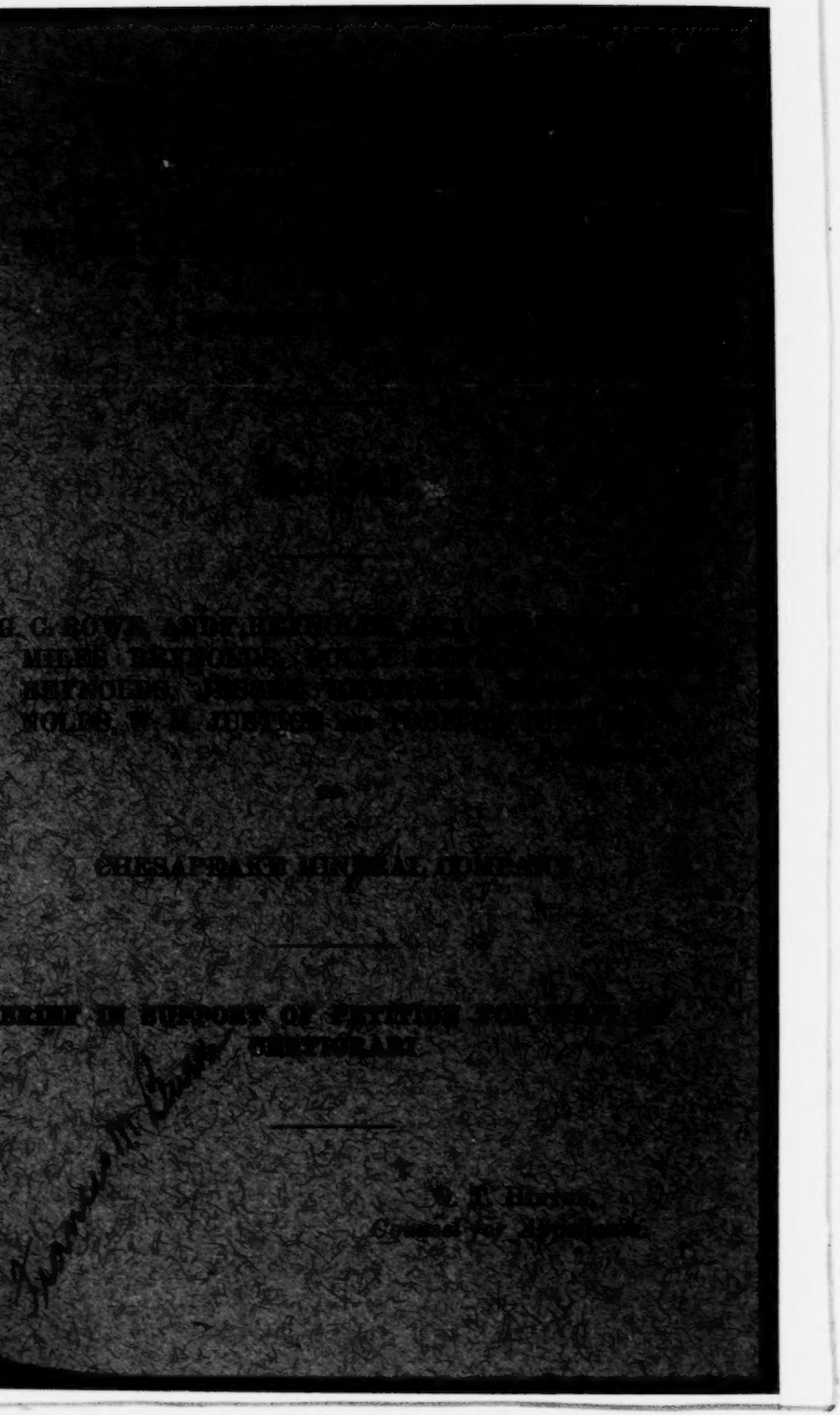
> "The appellee, being a purchaser for value without notice, was entitled to rely upon the record. Hudson & Collins v. McGuire, supra. It need only look to the recorded instruments,

and if they are fair on their face and free from ambiguity, the safety of its title is not affected by the intention of parties to instruments of which it does not have actual notice and which is not expressed in the instrument itself."
(R. p. 222)

Respectfully submitted,

O. T. HINTON
Attorney for Appellants

September 19, 1946



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 541

G. C. ROWE, ANDY REYNOLDS, GRACE REYNOLDS, MILES REYNOLDS, POLLY REYNOLDS, ALEX REYNOLDS, JESSEE REYNOLDS, SARY REYNOLDS, W. M. JUSTICE AND TOBITHA JUSTICE,

Petitioners,

vs.

CHESAPEAKE MINERAL COMPANY

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Reference to Official Report of the Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit to which this motion for writ of certiorari is directed and found on pages 217 to 223 of the printed record has been officially reported as follows:

G. C. Rowe, et al., v. *Chesapeake Mineral Company*, — Fed. (2) — (not yet reported).

II. Grounds of Jurisdiction

The jurisdiction of this Court is sought pursuant to the provisions of Title 28, U. S. C. A., Section 347 (a). The judgment sought to be reviewed was rendered by the United States Circuit Court of Appeals, Sixth Circuit, Action No. 10094, in that Court, on July 8, 1946, and appears on pages 217 to 223 of the printed record of the proceedings in that court, and the United States District Court for the Eastern District of Kentucky.

Original jurisdiction in the United States District Court for the Eastern District of Kentucky was based upon diversity of citizenship and an excess of $3,000.00 involved under the provisions of Title 28, U. S. C. A., Section 41 (1, a), all of the appellants being citizens and residents of the Commonwealth of Kentucky, and the appellee being a corporation domiciled in the State of New Jersey.

The reasons urged for granting the writ of certiorari are that the Circuit Court of Appeals for the Sixth Circuit has decided an important question of local law in conflict with local decisions, Rule 38-5-(b), and has based its opinion and judgment upon a question of fact in conflict with the expressed finding of the District Court upon that question of fact.

III. Statement of the Case

A. Questions Involved

The sole question presented by this record is the ownership of or title to the oil and gas and incidentally salt water underlying about 1125 acres of land in Pike County, Kentucky, which depends and brings into consideration these questions:

Where the words "Salt water, oil, gas" on a printed form of mineral deed reading "coal, [redacted] and mineral" are struck out by drawing an inked line through those words, as indicated above, in the three places where

they appear in the printed form, *i. e.*, the granting clause, the *habendum* and the warranty clause, and the deed is recorded without showing this deletion so as to read "coal, and mineral" in each place,

a. Did the grantors intend to convey the "salt water, oil, gas"?

The appellants contend that the answer is "No".

b. Where the deed as recorded does not show this deletion, did an innocent purchaser for value without notice of the fact that the deleted matter "salt water, oil, gas" had been so struck out acquire title to the salt water, oil and gas?

The appellants contend the answer should be "No".

This question turns upon the following considerations:

(1) Where the deed made in 1887 conveys "coal, and mineral" followed by a description of rights granted which are limited to the "right of entry to mine said coal, and mineral, with all the usual mining privileges," and a comma appears between the word "coal" and the word "and" in one place so as to read "coal, and mineral," was there sufficient ambiguity on the face of the instrument to justify resort to extrinsic evidence and circumstances to ascertain the intention of the parties with respect to the conveyance of the liquid substances "salt water, oil, gas"?

The appellants contend the answer should be "Yes."

(2) Where Appellee acquired title to the minerals passed by this deed by subsequent special warranty deed embracing other tracts of minerals originally acquired by the same grantee at the same time under at least fifteen other deeds drawn on the same printed form differing only in the phrase "coal and mineral" and containing the phrase "coal, salt water, oil, gas and mineral," is that sufficient to put the grantee upon inquiry as to why the words "salt

water, oil, gas" did not appear in the deed in question?

Appellants contend the answer should be "Yes."

(3) Where the only consideration moving from the grantee for the minerals covered by its special warranty deed was the construction of a railroad, was there sufficient "valuable consideration" for the minerals other than coal to constitute the appellee an innocent purchaser for value without notice?

Appellants contend the answer should be "No."

(4) Is there an equitable estoppel *in pais* against the grantors and those claiming under them to deny title to the "salt water, oil, gas" asserted by the appellee as innocent purchaser for value without notice where there is no plea of estoppel and no proof offered in support thereof, upon the theory that the grantors, by failing to exclude and reserve these substances by specific words, rather than deletion, were guilty of negligence amounting to constructive fraud?

The appellants contend the answer should be "No."

B. The Facts

The facts shown by the record upon which these questions depend are as follows:

On October 14, 1887, William H. Reynolds and others executed and delivered to John J. Stuart, Trustee, a general warranty deed on a printed form, by which they conveyed certain minerals in 1125 acres of land in Pike County, Kentucky. As described in the printed form, the minerals conveyed were "coal, salt water, oil, gas and minerals." A pen line was drawn through the words "salt water, oil, gas" in the three places where they appeared in the printed form (See photostat copy of original deed filed and made part of the record by order of

March 22, 1943 (R. 19), and transmitted to the Circuit Court of Appeals by order of August 14, 1945 (R. 200)).

We will endeavor to supply photostatic copy of this deed in this court by stipulation or such orders as may meet with the approval of this court before submission.

We consider an examination of the photostatic copy of the deed itself of importance to a thorough understanding of the appearance of that original instrument.

The words "coal and mineral" in the deed as recorded appear without any comma or other punctuation in the granting clause (R. 6) and in the warranty clause (R. 8). However, in the *habendum*, the words appear separated by a comma as noted above (R. 8).

About the same time, J. J. Stuart, as Trustee, procured mineral deeds from other parties covering other lands in this vicinity on this same printed form, as noted below.

We will hereafter refer to this deed for brevity as "the Reynolds deed."

By *mesne* conveyances, such minerals as were owned by the grantors under the Reynolds deed were conveyed to the appellants (See Stipulation, R. 27, and copies of deeds R. 27-120). No question of conflicting or overlapping claims as between the plaintiff and intervening petitioners (the appellants here) is involved (See stipulation, R. 37).

By *mesne* conveyances from John J. Stuart, Trustee, such minerals as passed under the deed from W. H. Reynolds et al. passed to the Big Sandy Company by deed dated August 11, 1902; to the Chesapeake and Ohio Railway Company by special warranty deed, dated September 12, 1906; and to the appellee by special warranty deed dated June 27, 1907 (See stipulation, Items 5, 7 and 8, R. 135, and stipulation R. 183).

The last mentioned deeds of June 27, 1907, from Chesapeake and Ohio Railway Company to Chesapeake Mineral

Company and of September 12, 1906 from Big Sandy Company to Chesapeake and Ohio Railway Company embraced other lands and covered approximately 3771 acres (Stipulation R. 183) and included the 1125 acre William H. Reynolds tract and the other tracts in which minerals were originally conveyed to John J. Stuart, Trustee, in 1887, by fifteen deeds identical in form with the Reynolds deed except the words "salt water, oil, gas" appear in each of these other fifteen deeds in the granting, *habendum* and warranty clauses of those deeds. The complete phraseology of each of these deeds was "coal, salt water, oil, gas and mineral" instead of "coal, and mineral" appearing solely in the Reynolds deed as recorded. See Stipulation (R. 144, Order filing, R. 143, and copies of deeds R. 145-179).

It is admitted that the appellee acquired title to the minerals conveyed by these fifteen deeds of 1887 to John J. Stuart, Trustee, as well as such minerals as passed under the Reynolds deed at the same time and by the same instrument. (See Stipulation R. 179).

The body of the deeds above mentioned from the Big Sandy Company to the Chesapeake and Ohio Railway Company, dated September 12, 1906, and the deed from the Chesapeake and Ohio Railway Company to the appellee, Chesapeake Mineral Company, dated June 27, 1907, containing special warranty provisions, may be found in the record, pages 212 to 215 inclusive, and pages 204 to 209 inclusive, respectively.

These deeds show that in the deed from the Chesapeake and Ohio Railway Company to the appellee recorded Deed Book 47, page 287, title to such minerals that were owned by the grantor in the land covered by the Reynolds deed, as well as the other minerals embraced were conveyed by *special warranty* only. The deed contained no warranty

clause but simply conveyed all right, title and interest of the grantor which it obtained under the prior deed from the Big Sandy Company.

These expressions of limitation appear in six places in this deed (R. 204-208).

The deed from Big Sandy Company to Chesapeake and Ohio Railway Company referred to in the deed to appellee, recorded in Deed Book 44, page 580, contained this warranty clause:

> "The said Big Sandy Company its successors and assigns covenants with the Chesapeake and Ohio Railway Company of Kentucky, its successors and assigns, that the estate, titles, rights, interests, privileges and property hereby conveyed are free and clear of all encumbrances made or suffered by said Big Sandy Company and that it, the said Big Sandy Company will forever warrant and defend the same against any and all persons claiming by, through or under it the said Big Sandy Company." (R. 214)

Thus, it is clear that the title to the oil and gas in controversy is claimed by the appellee and those through whom it claims title back through the Big Sandy Company by *special warranty only.*

It is conceded that appellants and appellee claim title to the oil and gas from a common source, i.e., W. H. Reynolds, et al., grantors in the Reynolds deed above referred to (See Agreed Stipulation, R. 25, Item (3)).

The controversy as to the ownership of the salt water, oil and gas (gas being the only one of these substances of any present concern) as between appellants and appellee was first brought to light by a letter from Francis L. Rice, an attorney of Pikeville, Kentucky, to Mr. R. P. Eubank, General Real Estate Agent of the Chesapeake and Ohio Railway Company, dated July 27, 1933 (R. 136-138). In that letter, Mr. Rice explained that he represented the then

owners of part of the lands embraced in the Reynolds deed; that they had opportunity to lease the lands for oil and gas purposes at fifty cents to one dollar per acre per year, but could not do so because of the cloud cast upon their title by the manner in which the Reynolds deed had been recorded, i.e., that the printed deletions above referred to were not shown as recorded (R. 137). He called attention to the fact that a similar deed with similar deletions had been executed by James J. Kendric to John J. Stuart, Trustee, about the same time and that upon his calling the matter to the attention of the Big Sandy Company which held under the Kendric to Stuart deeds, and which had conveyed the Reynolds tract to the Chesapeake and Ohio Railway Company, the Big Sandy Company had immediately disclaimed ownership of the salt water, oil and gas and executed a quit claim deed to those substances (R. 138). Rice requested similar disclaimer from the Chesapeake and Ohio Railway Company, or its subsidiary, the appellee (R. 139).

After submitting the matter to the company's legal department, Mr. Eubank wrote on August 29, taking the position that appellee claimed the oil and gas (R. 141-142).

C. Proceedings Below

Appellant, G. C. Rowe, brought this action in the District Court on July 6, 1942, (R. 1) seeking declaration of his rights as to the oil and gas in that portion of the Reynolds tract owned by him, to quiet his title thereto, damages resulting from appellee's claim and other proper relief. (R. 5)

Appellants, Andy Reynolds and others, as owners of other portions of the lands embraced in the Reynolds deed filed their intervening petition September 24, 1942 (R. 10), seeking similar relief.

The proof in the case in the lower court consisted mostly of the stipulations above referred to and the evidence of two of the appellee's officials who undertook to testify as to statements made by Orlando Reynolds, one of the grantors of the Reynolds deed, although Orlando Reynolds was not introduced as a witness.

The District Court characterized the evidence of these witnesses as follows:

> "I am not impressed with the testimony of Mr. Dallas Justice or Mr. M. L. Hanks, in which they state that in 1941 they visited Orlando Reynolds at his home on Grapevine Creek; that at that time Mr. Reynolds was a man in his nineties and in bed. Mr. Reynolds, at this time, owned about 25 acres of what had originally been the approximately 1100 acres in question. According to the testimony of the witnesses he stated that he did not own any minerals under this land as he had long since sold all the minerals. The testimony is so vague that it is of little evidential value." (R. 189)

The case was decided by the District Court on July 31, 1945, who delivered his opinion (R. 183-194) and made certain findings of fact (R. 195-196) and law (R. 196) and rendered judgment dismissing the complaint and intervening petition of the appellants and adjudged the appellee to be the owner of all of the mineral rights, including oil and gas in the lands embraced in the Reynolds deed (R. 196-197).

In the course of the District Court's opinion on the question of the intention of the grantors in the original Reynolds deed, he gave his reasons for holding that it was ambiguous on its face and evidenced an intention on the part of the grantors to exclude the salt water, oil and gas. These excerpts from the court's opinion are copied in our

petition for review (See pages 5-8) to which we respectfully refer without recopying.

We quote from the District Court's finding of fact on this question the following:

> "4. Other minerals, salt water, oil, gas, named in the deed were stricken out by drawing a line through the words, 'salt water, oil, gas'. This indicated an intention, and the court finds it a fact, that it was an intention on the part of the grantors, to reserve these minerals." (R. 195)

Although this finding is in favor of the appellants on this question of intention, which we insist is purely a question of fact, the District Court held that the appellants were estopped to assert title to the salt water, oil and gas involved in the controversy because of his theory of negligence on the part of the original grantors in "putting the deed in circulation" in such a form that it could be erroneously copied on the records by the clerk and held the grantors, or those claiming under them, responsible for the error of the clerk in not showing the true form of the deed and the deletions or interlineations of the words "salt water, oil, gas".

The appellants prosecuted an appeal to the United States Circuit Court of Appeals, where it was decided adversely to the appellants by opinion dated July 8, 1946 (R. 218-223) and judgment entered on the same date confirming the judgment of the District Court (R. 217).

This writ is prosecuted from that opinion.

IV. Specification of Assigned Errors to Be Urged

Errors to be urged:

Error One

The opinion of the Circuit Court of Appeals disregards the finding of fact by the District Court, page 13.

Error Two

The opinion is based upon the theory that the appellee, as innocent purchaser for value, had a right to rely upon the deed as recorded. This is entirely inconsistent with the former ruling of the Court that the dereliction of the clerk in recording the instrument was not chargeable to the grantor and is contrary to the Kentucky decisions on the subject, pages 13-23.

Error Three

The Court holds that the word "minerals" in a grant conveys oil and gas, notwithstanding the intention of the parties, contrary to Kentucky decisions applicable to the facts of this case, page 23.

Error Four

The Court holds that the word "minerals" in a grant conveys oil and gas irrespective of the time when the grant was made, contrary to the Kentucky decisions applicable to the facts of this case, pages 24-33.

Error Five

The opinion disregards the fact that the appellee took title to the minerals involved here by special warranty deed which conveyed minerals in at least fifteen other tracts acquired by deeds prepared on the same identical printed

form, all of which contained the deleted words "salt water, oil, gas," pages 33-34.

Error Six

The opinion in effect held that appellants were estopped to deny the title claimed by appellee when no grounds or elements of estoppel are shown, pages 35-38.

Error Seven

The opinion rejects the theory that the oil and gas formed no part of the consideration for the conveyance, pages 38-39.

V. ARGUMENT

Summary of Argument

Discussion of error one, page 13.
Discussion of error two, pages 13-23.
Discussion of error three, page 23.
Discussion of error four, pages 24-33.
Discussion of error five, pages 33-34.
Discussion of error six, pages 35-38.
Discussion of error seven, pages 38-40.
General considerations and reasons for allowance for writ of certiorari, pages 40-41.

Error One

The opinion of the Circuit Court of Appeals disregards the finding of fact by the District Court.

The Circuit Court of Appeals, holds, in effect, that the deletions of the words "salt water, oil, gas" by drawing a pen line through them in three different places did not create any ambiguity or evidence any intention to exclude those substances from the conveyance.

This is contrary to the expressed finding of fact by the District Court above noted and referred to. (See Opinion,

R. 185-191 and Finding of Fact R. 195.) It is a general rule which we think needs no citation of authority that a finding of fact by a trial court shall have great weight and not be disturbed unless it is entirely repugnant to the great preponderance of evidence.

Error Two

The opinion of the Circuit Court of Appeals is based upon the theory that the appellee, as an innocent purchaser for value, had a right to rely upon the record as it appears.

The opinion recites:

> "The appellee, being a purchaser for value without notice, was entitled to rely upon the record. Hudson & Collins *v.* McGuire, *supra.* It need only look to the recorded instruments, and if they are fair on their face and free from ambiguity, the safety of its title is not affected by the intention of parties to instruments of which it does not have actual notice and which is not expressed in the instrument itself." (P. 9-10 Petition for Review.)

This is entirely contrary to and inconsistent with the former ruling in the same opinion evidenced by this statement:

> "* * * the dereliction of the clerk, if such it was, in failing to copy the deleted words and to indicate the deletion, can in no way be charged to the grantor." (R. 220.)

The court's reason for this ruling is based upon the General Statutes in force in Kentucky at the time the Reynolds deed was made. See Chapter 24, Section 29, Kentucky General Statutes and Section 14 of the same Chapter (R. 219). See Appendix for copy of Statutes referred to.

These sections of the statute then in force show clearly and conclusively that it was solely the business of the

grantee to lodge his deed for record, and that it was the duty of the clerk to deliver the instrument, when recorded, to the "party entitled to the same", that is, the grantee.

Under these circumstances, we cannot understand how by any process of reasoning a mistake of a clerk in properly recording a deed presented for recordation *by the grantee* can be charged to the grantor.

To illustrate our view, let us suppose that the clerk in copying this deed had omitted not only the words that were struck out but had omitted as well the entire phrase "the coal and mineral lying and upon and under," so that the deed as recorded would have read as follows:

> "The said parties of the first part do hereby sell and convey to the said party of the second part all our farm containing 1125 acres."

and supposing further that the deed had not contained the superfluous reservation of the surface or that the clerk had omitted that portion of the reservation as well. Certainly, no court would hold that the grantor, by reason of this mistake of the clerk in recording the deed lodged for record by the grantee, would lose title to his surface to a subsequent innocent purchaser for value without notice of the clerk's mistake in recording the instrument, claiming under the grantee. Why then would that be any different from the situation we have presented here?

It made no difference to the grantor whether the clerk recorded the deed properly or not. The recordation was solely for the benefit and protection of the grantee.

Again, it is immaterial, we think, as to whose hand wielded the pen that struck out these words from the original instrument. It is self evident that it was the act of the grantor and not of the grantee. It was against the interest of the grantee to strike out these words. So then, having thus clearly and definitely evidenced his intention to ex-

clude from the conveyance these substances and reserve them unto himself, we think the grantor had a perfect right to rely upon the law as it then existed, which required the grantee to see to it that the deed, as executed, was properly and correctly recorded in order to protect the grantee against the adverse claims of any persons claiming under, by or through the grantor without notice of the grantee's rights under the deed.

We cannot see how, as between these allegedly innocent parties, i.e., the appellants claiming under the grantor and the appellee claiming under the grantee of this Reynolds deed, the loss must fall upon the grantor occasioned by the negligent act of the clerk who acted solely as the agent of the grantee. It was the grantee and not the grantor in every sense that made this mistake possible. It was for the grantee's benefit that it was required to be recorded. It was the grantee to whom the deed was delivered after it was recorded and who had the opportunity to discover the mistake of the clerk in recording it and have it corrected.

If any wrong has been done, or there is any blame to attach to anyone other than the clerk, the finger of fault points unerringly to the Big Sandy Company, who had possession of the original instrument, and who undoubtedly could have had the record corrected before conveying by special warranty deed to the railway company.

The question of whether or not a loss resulting from a mistake of the clerk in recording shall fall upon an innocent purchaser for value without notice has been considered by the Kentucky Court of Appeals in the following cases:

Hall v. *Wright,* 138 Ky. 71, 127 S. W. 516;

It was claimed that the words "and his children" appearing in the caption of the original instrument were omitted in the deed as recorded.

The question presented was whether a purchaser from the grantee took a fee simple title or a life estate with remainder to the grantee's children.

In syllabus (1) of the case as reported, this statement appears:

> "Where there is a mistake in the recording of a deed it is the duty of the grantee to see that it is corrected."

Although the Court held in this case that the children took the fee as against innocent purchasers, the failure of the clerk to correctly record the instrument was not the basis for the decision and there is no support in the opinion for this syllabus. The law of the case in Kentucky is not to be found in the syllabus as in some states, such as, West Virginia.

We cite this case merely to show that we have not overlooked it.

In *Cain* v. *Gray,* 146 Ky. 402, 142 S. W. 715, a deed from Mr. Duncan to his daughter, Mrs. Brittain, was duly lodged for record. The clerk correctly recorded the body of the deed but failed to record the certificate of acknowledgement. Hence, it was not a recordable instrument as disclosed by the record, and, therefore, not constructive notice of the conveyance to anyone. Mrs. Brittain died intestate, survived by her mother, who devised the property in question to a grandson for life with remainder to his children. The grandson conveyed a portion of the land to Cain.

After the grandson's death, his children claimed the land under the Brittain deed and her mother's will, as remaindermen against Cain and his grantees.

Cain and his grantees claimed that the title passed to Gray by descent from the original grantor, Duncan, on the theory that the deed from Duncan to Mrs. Brittain as recorded, was not constructive notice as against them, the innocent purchasers for value without notice.

The Court held that the deed, as recorded, was not constructive notice to anyone but as between the remaindermen claiming under the deed and will, and the innocent purchaser for value without notice of this deed, the loss must fall upon the innocent purchaser.

The Court held that the land belonged to the remaindermen under the deed and will, and that their rights were not affected by the failure of the clerk to properly record the deed.

This applies to the case here.

The appellants claim the oil and gas under the original deed, as prepared, against an alleged innocent purchaser for value without notice of the deleted portions of the deed, which reserved to the grantor the oil and gas. As between these claimants, if the rights of the parties be determined according to the *Cain* case, the loss must fall upon the appellee, though occuping the position of an innocent purchaser for value without notice.

The Court does say in this case that it was not the duty of Mrs. Brittain, as grantee, to do any more than deliver the deed to the clerk and pay his recording fee, and that when the clerk returned the deed to her bearing his certificate that it had been recorded, she had fulfilled her obligations and the Court by dicta overrules the earlier cases of *Herndon* v. *Ogg*, 119 Ky. 814, 84 S. W. 754, wherein it was held that it was the duty of the grantee to see that the instrument was correctly recorded.

But it must be remembered that in this *Cain* case, the Court was dealing with rights conveyed to a grantee which were diminished by the clerk's error in recording and not a case where the grantee's rights were enlarged by mistake in recording as we have in the instant case.

It is one thing to say that a grantee and those claiming under him cannot be deprived of rights specifically granted

under a recordable instrument, by the error of the clerk in recording it, but it is quite another thing to say that the rights of the grantee and those claiming under him can be enlarged by such error, and the grantor and those claiming under him deprived of their rights because of that error.

Put another way, a grantee may not be made to suffer by the failure of the clerk to properly record his instrument where he has done all that the law requires, but he cannot profit by such error at the expense of a grantor, and those claiming under him.

In *Bank of Kentucky* v. *Haggin*, 1 AK Marshall (Kentucky), 302 (22), a mortgage to the bank was duly lodged for record within the time prescribed by the statute. The clerk failed to record it. It was held that the mortgage was valid as against a purchaser at an execution sale on the ground that the law did not require the mortgagee to record but only to lodge the instrument for record.

Here the error of the clerk tended to deprive the grantee of his rights, not to enlarge them as in the instant case, and the Court held again that as between the grantee and the innocent purchaser, the innocent purchaser should bear the loss.

In *Buckner* v. *Davis*, 19 K. L. R. 1349, 43 S. W. 445, the question presented was the priority between two mortgages. Each mortgage had been duly lodged for record, but by oversight the clerk had failed to record the first mortgage until after the second mortgage had been lodged and recorded.

The Court held that the first mortgage took priority.

Here again, the loss occasioned by the clerk's error was held to fall upon the innocent purchaser, and again, we see a case where the error of the clerk tended to take away rather than add to the rights of the grantee.

The Kentucky Statutes of 1887 have remained substantially the same and now appear under Section 382.080 to 382.270 Kentucky Revised Statutes.

Our law, therefore, provides that all the grantee is required to do is to lodge the instrument for record, and the Kentutcky Court has consistently held that a mistake of the recorder will not deprive the person whose duty it was to record the instrument of his rights. The Kentucky Court has never held that a grantee, or those claiming under him, can profit by such an error or mistake or failure on the part of the clerk to properly record, and thus enlarge the rights granted by the instrument at the expense of a grantor, who had no duty to record the instrument.

We find an annotation in 70 A. L. R. 595-608 dealing with this question. This annotation embraces decisions from both State and Federal Courts and shows considerable conflict. However, when the cases annotated are considered in the light of the statutes of the respective states in which they arose, the conflict is more apparent than real. All of the cases cited in this annotation, including those from Kentucky, which we have discussed above, hold that where the statute merely requires the owner of the instrument to lodge it for record, he cannot be blamed or deprived of his rights by reason of the failure of the clerk to properly record it.

No one of these cases hold that the rights of the grantee and those claiming under him, innocently or otherwise, can be enlarged or enhanced by the mistake of the recording officer or his failure to perform his duty. Malfeasance of the recorder does not deprive him of his rights, but it does not add anything to them.

The mistake in this case consisted of the failure of the clerk to show the deletion of the three words "salt water, oil, gas" in the printed form of the deed in three different

places. The effect of that mistake as claimed by the appellee is to add to the title which they are claiming under that erroneously recorded deed. Had the mistake resulted in depriving the grantee of some rights under that deed, the Kentucky courts say the grantee and those claiming under him would be protected, but it has never said that the grantee could benefit or profit by such an error at the expense of the grantor who had no control over the instrument, after it was executed. The grantor in this case did not prepare the instrument. He was not the draftsman. It was drawn upon a printed form, prepared by the grantee. They were the words employed by Mr. Stuart, the grantee. When presented to the grantors, they did not like some of those words and struck out those words describing liquid substances, which they evidently did not consider as embraced within the term mineral and which they did not wish to alienate.

Whose hand wielded the pen, as we have noted, is of no consequence. The fact remains that there was a pen line drawn through these three words in the three places in the printed form and they are there for all to see. The words thus eliminated speak out and the fact that they were struck out proclaims the intention of the parties to that instrument just as plainly as if it had been written in the instrument that the grantor did not intend to convey those migratory substances which our courts have now defined as minerals, although they, no more than coal, are in fact minerals in a technical sense. Coal is not a mineral. It is a product of vegetation. That, perhaps, explains why the legal mind that prepared that deed, prior to 1887, specified coal as well as salt water, oil and gas to be certain that those substances would be included in his conveyance. Otherwise, he would have been content to use the general term "mineral" as laterly construed by the courts to be all inclusive and embrace coal, which is a product of vegetation, oil and gas,

which are animal products, and salt water, which is partly mineral. Undoubtedly, if the draftsman of that deed had the benefit of judicial construction and definition of the word mineral, as now employed in legal parlance, he would not have felt under any necessity to employ any specific words in the deed. He would have been entirely satisfied to use the generic term mineral. Evidently, the word coal was not included in the general term mineral in the mind of the draftsman of that instrument at that time. It is equally evident that the terms salt water, oil and gas were not considered as embraced in the term mineral. Otherwise, the draftsman of that instrument would have said: "coal, salt water, oil, gas and *other* minerals". But he did not employ the word "other", nor did he use the plural of mineral. He specified certain substances and for good measure added the word mineral. One gets the impression from reading the instrument that after describing the specific items which he wished to purchase he wanted to add something to it. The grantor in this case did not wish to sell those substances specified in the deed which he struck out. He was willing to part with any claim that he had to mineral, as that word was then understood, and I can well imagine that he had in mind silver, lead, copper, zinc or other hard fixed mineral substances, which might or might not be found under his land, but he was not willing to part with any claim that he might have to the substances struck out.

Had it been the duty of the grantor to have his deed recorded, we could understand that the mistake of the clerk in failing to record it, as written, might deprive the grantor of his claim to these substances which he was so careful not to convey, but it was not his duty nor his right to record the instrument. Now, then, to say that the grantee can profit by the mistake of the clerk and add to his grant things that were expressly excluded would appear to be a dangerous and unequitable process.

Error Three

The Circuit Court of Appeals holds that the word "minerals" embraces oil and gas without qualifying the provision well recognized in Kentucky that this is only true where there are no expressions of limitations in the grant, or any ambiguities in the language of the deed. This exception to the rule, as disclosed by the opinions of the Kentucky courts, is so well established that it may be said to be the rule rather than the exception. In fact a review of the Kentucky authorities shows that it was the rule first announced and has never been modified or overruled.

We will discuss these cases generally under error four.

Error four

The opinion of the Circuit Court of Appeals holds that the element of time as to when an instrument containing a general conveyance of minerals is of no importance as bearing upon the intention of the parties or the substances conveyed which we think is contrary to the decisions of Kentucky dealing with deeds made in the late eighteen nineties and particularly about 1887, when the Reynolds deed was made.

May we, therefore, discuss the Kentucky cases bearing upon these errors designated as number three and number four:

It is true that in modern times the Kentucky Courts have consistently held that in the absence of anything in the instrument showing an intention to limit the word "mineral" or "minerals" in a conveyance, oil and gas are embraced and conveyed. *Scott* v. *Laws* 185 Ky. 440, 215 S. W. 81; *Kentucky West Virginia Gas Company* v. *Preece* 260 Ky. 601, 86 S. W. (2) 163; *Federal Gas, oil and Coal Company* v. *Moore* 290 Ky. 284, 161 S. W. (2) 46;

Hurley v. *West Kentucky Coal Company* 294 Kentucky 96, 171 S. W. (2) 15, and many other cases.

The opinion of the *Scott* v. *Laws* case concludes as follows:

> "Since oil and gas are minerals, and there is nothing in the language of the deed in question which shows that the parties contemplated something less general than all substances legally cognizable as minerals, we conclude that the title to the oil and gas necessarily passed by the conveyance."

However, this was not always the law in Kentucky.

Furthermore, in all these decisions, the Courts have rigidly adhered to the doctrine that if there is anything in the instrument showing an intention to limit the words "mineral" or "minerals" or to exclude liquid substances, such as, salt water, oil or gas, or if there is any ambiguity as to the intention of the parties as gathered from the instrument as a whole, extrinsic evidence will be considered and the real purpose and intention of the parties, thus ascertained, will control as between the parties and all persons claiming under them, including innocent purchasers for value without notice.

The first case in which this question appears to have been involved was *McKinney Heirs, et al.* v. *Central Kentucky Natural Gas Company,* 134 Ky. 239, 120 S. W. 314.

The facts in that case were similar in many respects to the case which we have here. In the first place, the deed in question was executed on March 25, 1871. The deed in the case under consideration was executed on October 14, 1887. The granting clause of the deed in that case was "all minerals such as coal, iron, silver, coal, copper, lead, bismuth, antimony, zinc or any other minerals of marketable value contained within the following boundary of land * * *."

After describing the land the deed then granted "the right to explore, prospect, mine and dig upon any of said land for any of the above minerals, or any other of any marketable value together with the right of timber, stone, or any other material necessary for improvements for mining, to sink shafts, open drifts or do anything else on said land necessary to the development of said minerals."

There were two deeds under consideration, and the second deed contained similar language. It was contended that the broad term "minerals" contained in these deeds embraced natural gas. The Court held otherwise and says:

> "But the question to be determined is: *What was the intention of the parties to the deeds at the times they were made? Did the grantors understand at that time that oil and gas were minerals* and would pass with the other minerals named in the conveyances; and did they intend to convey the gas? In other words, did the minds of the parties to the conveyances meet upon the questions? Did the one understand that he was conveying, and the other that he was purchasing, the gas thereunder? If not, the gas did not pass with the conveyances. The solution of this question depends upon the language used in the conveyances and the facts and circumstances surrounding the parties at the time they made them." (Italics mine.)

It is interesting to note that in this first Kentucky case, the court expressly takes into consideration the *time the deed was executed,* and the general circumstances prevailing, particularly, with respect to the *general understanding* of the term "mineral." The court says: "We have not been cited to nor have we been able to find any decisions in Kentucky that throw any light upon the subject." The court then proceeds to consider many other cases from

other jurisdictions. On the question of *time*, it is interesting to note that the court has this to say:

> "* * * the State and assistant state geologist of Kentucky, and they testified that not until the year 1885 or 1886 did natural gas have any marketable value in the state of Kentucky, and that it was at that time piped from Meade County to the city of Louisville."

Further on the court says:

> "Appellants introduced several witnesses who resided in Menifee County near the lands containing the gas in controversy. They testified that, about the time these conveyances were executed, there was great excitement in that locality over natural gas. The preponderance of the proof, however, is to the effect that the excitement was over the discovery of coal, and that the parties obtained these conveyances with the view of mining coal, which they did to some extent, but have long since ceased to use it for that or any other purpose. *We may here remark that, if the excitement at that time was caused by the discovery of natural gas, it is strange that in drawing the conveyances they did not use words which would have, without doubt, included natural gas.* In addition to the oral testimony as to the history of natural gas at the time the conveyances were made, we will consider the language of the conveyances to ascertain the intention of the parties at the time they were executed. If *natural gas was in the minds of the parties at the time of the execution of the conveyances, we would expect to find expressions or terms which would refer specifically to the rights and privileges necessary to the development of it. We erect derricks and drill for gas and pipe it to market; but there is not a grant of a right to the use of timber in erecting derricks, or of an easement for pipe lines, or with reference to the removal of machinery used in drilling. In fact, there is not a word in the conveyances giving the parties a right to exercise any of the privileges necessary in*

drilling for natural gas. The word 'minerals', as used in the conveyances, taken in its broadest sense, would include natural gas; but the question is: Did the parties intend to include it in the conveyances? There is nothing to show that it was the intention of the parties that natural gas should be included by the word 'minerals', and the easements granted in connection with the rights therein conveyed are not applicable to the production of natural gas, which shows that it was not intended that gas was to be included in the conveyances." (Italics mine.)

The court then concludes:

"We are of the opinion that appellants did not obtain by their conveyances the natural gas under the lands described therein."

This case on this proposition has been followed in the following Kentucky cases:

Hudson & Collins v. *McGuire,* 188 Ky. 712, 223 S. W. 1101;

Rice et al., v. *Blanton* 232 Ky. 195, 22 S. W. (2) 580;

Rudd v. *Haynden* 265 Ky. 495, 97 S. W. (2) 35;

Maynard et al. v. *McHenry et al.,* 271 Ky. 642, 113 S. W. (2) 13;

Kalberer et al. v. *Grassham,* 282 Ky. 430, 138 S. W. (2) 940;

Sparks Milling Company v. *Powell et al.,* 283 Ky. 669, 143 S. W. (2) 75, 77.

This case has been cited with approval and distinguished in the following cases:

Kentucky Diamond Mining & Developing Company v. *Kentucky Transvaal, etc.,* 141 Ky. 97, 132 S. W. 397;

Scott v. *Laws supra;*

Blakely et al. v. *Wilson et al.,* 190 Ky. 697, 228 S. W. 23.

This case has also been cited with approval in the following Federal cases:

Lovelace v. *Southwestern Pet. Co.*, 267 Federal 504, 510 (Opinion by Judge Cochran);
Lovelace v. *Southern Pet. Co.*, 267 Federal 513, 517 (6th Circuit);
Ky. Coke Co. v. *Keystone Gas Co.*, 296 Federal 320, 324 (6th Circuit).

This case was decided before the case of *Scott* v. *Laws* which, as we have noted, cites the *McKinney* case and distinguishes it but does not in any way overrule or modify it.

In the still later case of *Hudson and Collins* v. *McGuire, supra,* the deed involved granted "all of the minerals (except stone coal) with necessary right of ways and privileges for prospecting, mining and smelting on my tract of land * * *."

The deed in this case was executed in April 1891. The question before the court was whether or not title to the oil and gas passed under this deed to an innocent purchaser for value. The facts of that case were so strikingly similar to the facts of this case that we think it is absolutely controlling. The Court held that although minerals used in the granting clause was broad enough to include oil and gas, the use in the granting clause of the words "mining and smelting" together with the failure to use the words "oil and gas" was sufficient to render the instrument ambiguous on its face and open the door to extrinsic evidence to show what the parties intended *even as against the claims of a subsequent innocent purchaser for value without notice.*

The court reviews many of the earlier cases, and elementary rules of construction of instruments, and consider both the *McKinney* case, above referred to, and the case of

Scott v. *Laws* relied on by the appellee. We take the liberty of quoting at length from the opinion as follows:

> "In the light of these principles, we will now look more carefully into the clause in question for the purpose of determining whether on its face oil and gas was excluded from the grant, or, if not, whether it is sufficiently uncertain and ambiguous to authorize as between third parties a resort to extrinsic evidence for the purpose of arriving at the intention of the parties in its execution.
>
> "It may also be conceded at the very beginning of this inquiry that the word 'minerals', without qualifying or limiting words in an instrument like this, would pass to the grantee, not only coal, iron, and other like substances that are commonly understood by people generally to be minerals, but also the oil and gas, *although it is not amiss to here observe that in 1891, when there had been little, if any, oil or gas development in this state,* or even now when great quantities of both have been discovered in some sections, *there are few people outside of the legal profession and those interested in mineral, oil, and gas development who understand or appreciate that the word 'minerals'* includes oil and gas, because in common everyday usage oil or gas would not be spoken of as a mineral. 'Minerals', as commonly understood, would mean such substances as are *reduced to domestic or commercial use by what are generally known as mining methods, and mining methods are not employed, at least in this state, in the production or manufacture of oil or gas.*
>
> "This court, however, as well as others, had definitely ruled that the word 'minerals' includes oil and gas, and therefore, if this clause had read 'all of the minerals, except stone coal, with necessary right of ways and privileges for prospecting', and there had been omitted from it the words 'mining and smelting,' there could be no doubt *that as between third parties for value,* as in this case, the deed would be construed as conveying the oil and gas, and extrinsic evidence would not be admissible to show that the parties did not

so intend. Scott *v.* Laws, 185 Ky. 440, 215 S. W. 81. It would then have been legally speaking, free from ambiguity, and extrinsic evidence would not be admissible to show the intention of the parties.

"But this instrument does not stop with the conveyance of minerals, except stone coal, and the necessary right of ways and privileges for prospecting, or leave undefined or unexplained the nature of the minerals intended to be conveyed. It recites that 'all of the minerals, except stone coal, are conveyed, with necessary right of ways and privileges, for prospecting, mining and smelting,' and it is the use of the words *'mining and smelting,' and the failure to use the words 'oil or gas' or any other words that would have a tendency to show that the right to explore and develop the land for oil and gas purposes was intended to be granted that creates a reasonable doubt whether it was intended to convey any minerals, except those of such nature as to render necessary in their production for marketable purposes the process of mining and smelting.*

"The words 'mining and smelting' are appropriate in connection with the production of many minerals other than oil and gas, but they have no place in a grant of oil or gas rights or privileges, and the use of these words, as well as the absence of suitable words to show that oil or gas was intended to be conveyed, was sufficient to put a purchaser under the deed on notice that the grant did not include oil or gas." (Italics mine.)

The court then refers to and quotes at length from the case of *Detlor* v. *Holland,* 57 Ohio State 492, 49 N. E. 690, 40 L. R. A. 266, which was also a case very similar to the case presented both here and in the *McGuire* case. The opinion then refers to the *McKinney* case *supra* and the *Kentucky Diamond* case *supra.* The court concludes that the deed is ambiguous on its face and in doing so says that the *Kentucky Diamond* case and the *Scott* v. *Laws* case,

above referred to, are not overruled but are adhered to. The court then says:

> "Applying now the principles stated to the deed in question, we are of the opinion that it is so ambiguous and uncertain on its face, and contains such limiting and qualifying words, as to put purchasers for value on notice that it may not have conveyed oil or gas rights and privileges, and therefore it was permissible for the plaintiffs to show, if they could, that both parties to this deed intended that the meaning of the word 'minerals' should be limited so as to include only such mineral substances as are ordinarily subjected to processes of mining and smelting in their production and manufacture for domestic or commercial purposes."

This *Hudson* and *Collins* case is cited in practically all of the cases listed above under the *McKinney* case and in addition is cited with approval in the following later cases:

Ogle Coal Company v. *Martin,* 232 Ky. 564, 24 S. W. (2) 296, 297;
Bolen v. *Casebolt,* 252 Ky. 17, 66 S. W. (2) 19, 20;
Kentucky West Virginia Gas Company v. *Preece supra;*

Not all of these cases in which the *McKinney* case and the *Hudson* and *Collins* case are cited, deal with the exact question now under consideration, but most of them do. They are cited in this brief simply to show the court that the principles announced in those decisions have not been overruled or modified as indicated by the Circuit Court of Appeals' opinion (R. 222), and are still recognized as the law in this jurisdiction, both by the State and Federal courts.

In the case of *Rice* v. *Blanton supra,* the granting clause of the deed in question was:

> "All the coal minerals and mineral products, fire and potters clay, all iron and iron ore, all stone and the exclusive rights of way for any and all railroad and ways and pipe lines."

The question was whether or not the title to oil and gas passed under this deed. The court held it did not. In this case, the court considered that the failure to punctuate by comma between the words "coal" and "minerals" was important (contrary to the ruling in *Hurley* v. *West Virginia Coal Company supra*). It also bases its opinion upon the fact that other hard substances were specifically mentioned in the deed showing an intention to confine the grant to hard substances as distinguished from liquid substances. We quote from the opinion:

> "Appellants insist that the words 'all minerals and mineral products' include oil and gas, and that oral evidence was inadmissible to show that they were not intended to be included in the contract or deed. If the instruments had used the words 'all minerals and mineral products', and no more, doubtless there would be merit in the contention. This is a case where much depends on the punctuation. In the copy of the contract before us there is no comma between the words 'coal' and 'minerals'. Therefore there is some basis for the view that the word 'coal' was not used as a noun, and therefore to designate a separate and distinct mineral, but was used as an adjective for the purpose of defining and qualifying the words 'mineral and mineral products'. This construction finds support in the employment of the words 'fire and potters clay, all iron and iron ore, all stone,' thus showing an intention to convey what might be termed hard minerals as opposed to minerals like oil and gas. In the circumstances we agree with the chancellor that

> the instrument is so ambiguous as to leave the mind in doubt as to what the parties intended, thus presenting a situation where extrinsic evidence may be resorted to as an aid in its construction."

From these cases, it seems clear to us that the principles applicable to the case under consideration can be deduced as the clear and well established law in this jurisdiction.

(1) Where the privilege granted incident to the minerals is limited to the right to "mine" with the usual "mining privileges," there is sufficient doubt created and ambiguity as to the meaning of the general term "mineral" or "minerals," as used in this deed in the phrase "coal and mineral" (as recorded) to open the door to a consideration of extrinisic facts and circumstances bearing upon the question of whether or not the parties intended to convey the oil and gas.

(2) The extrinsic circumstances to be considered are:

(a) The all important fact that the words "salt water, oil, gas" were lined out in three places.

(b) The date when the deed was executed and the fact that in 1887 neither oil nor gas were known to exist in this territory or considered as minerals, as the term was then used, or had any marketable value.

(c) The fact that the privilege granted was limited to *mining* showed that the parties did not contemplate the granting of either oil or gas or any other liquid substance and that the grant was confined to the coal and other hard substances generally understood to be included in the term "mineral" *at that time.*

(3) If the instrument is open to doubt upon its face for the reasons above indicated, the rights of a subsequent innocent purchaser for value are not any greater than those of the grantee.

If these principles are correctly stated and deducible from the controlling Kentucky authorities (and we think that they are), then the Reynolds deed under consideration must give way to the exception to the general rule of construction as to the meaning of the words "mineral" or "minerals" adopted by the courts in modern times and open the door to extrinsic evidence. This would lead directly to the facts and circumstances of the original deed. We are then back to the finding of the District Court on the question of fact as to the intention of the parties. The court held, and we earnestly insist that one cannot examine this original instrument without being convinced, that it was the purpose and intention of the parties to exclude salt water, oil and gas from this conveyance.

The fact that these words were struck out in three separate places on the printed form strikes the eye at first glance and leaves no doubt in the mind of the examiner that the parties to that instrument did not intend to include those substances. The pen line drawn through these words is to be given as much consideration in determining the intention of the parties as if they had interlined it and said in so many words "These substances are excluded and not conveyed."

Error Five

The Circuit Court of Appeals disregarded the proposition that the appellee acquired title to the minerals from other lands conveyed by deeds identical in form with the Reynolds deed except that the printed words "salt water, oil, gas" were struck out of the Reynolds deed and that they acquired title to all of these minerals by special warranty deeds.

The Reynolds deed was identical in form with at least fifteen other deeds conveying the minerals to the same grantee, all of which were embraced in the same deed to

the appellee by which they acquired title to the minerals which passed under the Reynolds deed, save only with respect to the description of the minerals conveyed. We argued that this was sufficient to put the appellee upon inquiry.

The District Court refers to this as an "inference upon and inference." We do not think that this can be fairly described as an inference. It is a fact that the Reynolds deed described the substances conveyed merely as "coal, and mineral." It is a fact that the other deeds described them as "coal, salt water, oil, gas and mineral" and were in all other respects identical in form with the Reynolds deed. It is a fact that appellee took title to all by the same instrument and that it was a "special warranty" deed.

These *facts* were sufficient, we contend, to put the appellee upon inquiry as to why the words "salt water, oil, gas" were omitted in the three places in the Reynolds deed, where they appeared in each of the other deeds.

The record shows that the original deed was in the possession of the Big Sandy Company, the immediate grantor of the parent company, Chesapeake and Ohio Railway Company. Both the appellee and the Chesapeake and Ohio Railway Company held under special warranty deeds, and therefore knew that they had no better title than did the Big Sandy Company. Any inquiry as to this discrepancy in the Reynolds deed would have readily revealed the real reason, which was, that those words "salt water, oil, gas" were struck out of the Reynolds deed in three places by a pen line drawn through them.

We contend that these circumstances alone are sufficient to put the appellee upon inquiry, but even if not sufficient in themselves, certainly they were sufficient when taken with the other facts and circumstances surrounding the trans-

action and the ambiguity shown on the face of the instrument itself, as recorded.

Error Six

The Circuit Court of Appeals held that although the grantors in the deed could not be charged with negligence of the clerk in recording the instrument, yet they were in effect estopped to deny the title to a so-called innocent purchaser for value without notice to the oil and gas.

The District Court in support of his theory of an equitable estoppel *in pais* quoted at some length from 19 Am. Jur. Section 187, p. 743 (R. 193).

This is undoubtedly a correct statement of general law. However, we fail to see that it has any application to the instant case.

In this same text, in discussing the "quantum of proof" required to support a plea of equitable estoppel or estoppel *in pais*, the following appears:

> "The rule is well settled that the proof offered to show an estoppel must be certain in every particular, leaving nothing to mere inference or intendment. The evidence must be clear, precise, and unequivocal. Mere conjecture is insufficient, even though a proper foundation is laid for the estoppel in other respects. An estoppel in pais may not be predicated on an inference and the statement of Lord Coke that 'every estoppel because it concludeth a man to allege the truth must be certain to every extent, and not to be taken by argument or inference' is still the law. The rule as to the clarity and conviction of evidence necessary to constitute a satisfactory quantum has been expressed in many substantially similar expressions by the courts. Thus, it has been said that an estoppel in pais may not be enforced unless substantiated in every particular, that all the essential elements of an estoppel must be proved and shown to be present, that every fact essential to the estoppel must be clearly and un-

> equivocally or clearly and satisfactorily proved, that the facts must be established by clear and convincing proof, and that to constitute an estoppel, conduct must be clearly established by a preponderance of the evidence." 19 Am. Jur. 852-853.

Under this statement of the law, the doctrine is not applicable in this case for two outstanding reasons:

(1) No plea of estoppel was made.

(2) No proof of any of the essential elements of estoppel was introduced.

The lower court expressly held that the burden of proof on the question of "innocent purchasers for value without notice" was upon the appellee. See paragraph 5 of the pretrial order of January 7, 1944 (R. 26).

We have seen above that in order to apply the doctrine of estoppel *in pais*, all of the facts and circumstances upon which this doctrine is based must not only be plead (which they were not in this case) but must be proven as Lord Coke says: "To every extent and not to be taken by argument or inference."

The only proof in support of this theory of estoppel which appears in the record is the evidence of Mr. Michie, the assistant secretary of the Chesapeake and Ohio Railway Company, who testified that he had been in the office of the Secretary of the railway company, since 1906, and that office "had custody of the records of the Chesapeake Mineral Company" (R. 106, q. 8). He does not say what records. He was asked to examine his file to see if the railway company or the appellee ever had the original Reynolds deed. He said he had examined his record and that *he* had never had such an instrument. He does not say that no other official of the railway company or the appellee had ever had the deed. Neither he nor anyone else

testified as to what transpired between the officials of the Big Sandy Company who had the original deed in its possession and the officials of the railway company, when the railway company acquired the property by the deed of 1906.

For all that appears in this record, the Big Sandy Company may have shown that deed to whatever official of the railway company took delivery of the 1906 deed, and may have called his especial attention to the fact that the words "salt water, oil, gas" had been struck out of this printed form in the deed from Reynolds and others. They may have told them that they knew about this deletion and were making no claim thereto, as they told Mr. Rice, in 1933, with respect to other land similarly acquired.

In short, there is no proof whatever that the appellee, or its parent company, the Chesapeake and Ohio Railway Company, did not know of the exact condition of the original Reynolds deed, or that they relied in any way upon the record as copied by the county clerk.

Thus, we have not only failure to plead estoppel, but, there is no proof of any kind except by the merest inference that the railway company, or the appellee, relied in any way upon the record of the Reynolds deed, or that they ever had the slightest notion that they owned any interest in the oil or gas, until their attention was called to the mistake in recording by Mr. Rice's letter of 1933. They did not even have the title abstracted until 1916 (R. 125, q. 1 and 2).

On the contrary, there is every indication from the evidence before the court that they did not know that they had any claim to the oil or gas until 1933, when Mr. Rice wrote them about the matter, because it was then, and for the first time, that they submitted it to their attorney, and after a time obtained his opinion, to the effect that under the

circumstances, as revealed by Mr. Rice's letter, they might have some claim to the oil and gas.

There is, therefore, no proof that either the railway company or the appellee relied in any way upon the record, or that they were in any way misled thereby, or suffered any detriment or loss on account thereof.

All of these things are not only essential to support a plea of estoppel but the burden of proof was upon them, and they have failed to meet this burden.

The District Court applied this doctrine of estoppel *in pais* solely upon the ground of the alleged negligence of the grantors in putting this Reynolds deed in circulation in such form that the clerk, in recording the instrument, could and did fail to record it as the original appeared, and without showing the deleted words.

We have endeavored to show above that it was not the duty or right of the grantor to lodge the deed for record or to see that it was properly recorded or to receive it back after it was recorded under the Kentucky law. Consequently, we fail to see, as did the United States Circuit Court of Appeals, any ground for the theory of negligence on the part of the grantors in putting the deed in circulation in the form in which they did.

If we eliminate this theory of negligence, we fail to see where there is any support for any other theory of estoppel.

Estoppel must be based upon some act or omission on the part of the grantors in this case which misled the grantee and those claiming under them, to their detriment.

Error Seven

The Circuit Court of Appeals rejected the theory that there was any valuable consideration for the conveyance of these minerals to the railway company.

Mr. Harrison, right of way agent for the railway company, the parent company of the appellee, testified that the

sole consideration for the conveyance from the Big Sandy Company of these mineral rights, including those passing under the Reynolds deed, was the construction of the railroad (R. 126, q. 7-8).

Manifestly, the only thing that the parties to that transaction were interested in was the development of the coal lands in this section of Kentucky. The railroad was attracted solely by the prospect of tariffs to be derived from transporting coal. They were not concerned in any way with either the production or transportation of any other minerals, or of salt water, oil or gas.

This was merely the culmination in 1906 of the program initiated by John J. Stuart, Trustee, in 1887, to acquire the title to the coal in this section and eventually interest capital in the development of the coal and eventually procure the construction of a railroad in order to furnish an outlet for this product. Coal was the sole consideration of this project from beginning to end. No thought nor consideration was given to any other mineral or mineral substance. Hence, we contend that so far as the oil or gas underlying this Reynolds tract was concerned, these substances did not constitute any part of the consideration involved in the conveyance from the big Sandy Company to the Chesapeake and Ohio Railway Company and cannot be now asserted as the basis for a claim by the appellee that they were misled by the manner in which the deed was recorded, and that but for this, they would not have constructed the railroad or accepted the deed from the Big Sandy Company as an inducement to construct a railroad.

None of these substances, salt water, oil or gas, were in the minds of any of the parties to that transaction.

Furthermore, we have shown above that the appellee took only such right and title as the Chesapeake and Ohio Railway Company acquired from the Big Sandy Company, and

that the Chesapeake and Ohio Railway Company acquired only such right and title as the Big Sandy Company owned. There is nothing in this record to show that the Big Sandy Company, in whose possession the original deed was found and who presumably had the deed from the time it acquired title to the land, did not know that the words "salt water, oil, gas" were struck out of that deed.

This presumption is strengthened by the fact that they readily quit-claimed any interest in these substances in other lands where these words had been struck out of the conveyance, when their attention was called to it by the letter from Mr. Rice, in 1933.

It is, therefore, our contention that the appellee, holding under special warranty deeds from the Big Sandy Company, can stand in no better position than could the Big Sandy Company itself.

General Considerations and Reasons for Allowance of Writ of Certiorari

The question presented here is a new one.

The District Court observes "No similar case can be found" (R. 185).

In view of the fine lines of distinction which the Court of Appeals of Kentucky has made in the two classes of cases on both the question of considering the time when the deed was made and the circumstances under which extrinsic evidence can be considered in construing mineral deeds generally, we cannot say we have any settled law in Kentucky on these questions.

Furthermore, this is a most important case to those owning mineral lands and holding leases thereon in Kentucky. There are many thousands of acres of land, the minerals of which had been conveyed on printed forms similar to those shown in this case where the words "oil and gas"

have been struck out and this fact shown on the record as recorded. No question has been made as yet about the proposition that such deletion showed an intention to reserve the deleted substances. However, if the opinion of the Circuit Court of Appeals was to stand, then it immediately brings into question the title to the oil and gas underlying all of these oil and gas rights and jeopardizes the rights of many persons and concerns who have spent large sums of money in developing these lands upon the assumption that such deletion showed a reservation and an intention not to convey these substances.

The plain equities and justice of the matter, we think, demands that the rights of the appellants, with respect to this oil and gas, be recognized.

Respectfully submitted,

O. T. HINTON,
Attorney for Petitioners.

APPENDIX

Section 8 of Chapter 24 of the General Statutes, then in force, is as follows:

"No deed conveying any title to, or interest in, land for a longer time than five years, nor any agreement in consideration of marriage, shall be good against a purchaser, for a valuable consideration, not having had notice thereof, or any creditor, *unless* the same be acknowledged by the party who shall execute the same, *or* be proved *and* lodged for record in the proper office, as prescribed by law; and the provisions of this section shall apply with like protection to the creditor of, or innocent purchaser from, the heir or devisee of the grantor." (Emphasis mine.)

Section 14 of Chapter 24, General Statutes, is as follows:

"Deeds made by residents of Kentucky, other than deeds of trust and mortgages, shall not be good against a purchaser for a valuable consideration not having notice thereof, or any creditor, except from the time the same shall be legally lodged for record, unless the same be so lodged within sixty days from the date thereof."

Section 29 of Chapter 24, General Statutes, is as follows:

"Instruments which have been or may be recorded shall be delivered to the party entitled to the same."

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 541

G. C. ROWE, ANDY REYNOLDS, GRACE REYNOLDS, MILES REYNOLDS, POLLY REYNOLDS, ALEX REYNOLDS, JESSEE REYNOLDS, SARY REYNOLDS, W. M. JUSTICE AND TOBITHA JUSTICE,

Petitioners,

vs.

CHESAPEAKE MINERAL COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LeWRIGHT BROWNING,
Counsel for Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in *156 Fed. (2) 752* (Advance Sheets), and is reprinted at R. 218, et seq. The opinion of the District Court is reported in *61 F. Supp. 773*, and is reprinted at R. 183, et seq.

I.

No Grounds Exist Herein for the Granting of Certiorari.

The question involved in this litigation is the construction of a mineral deed to Kentucky land under the pertinent decisional law of that state. There is no showing of any ground for certiorari under the provisions of

Rule 38, Rules of the Supreme Court.

Certiorari will not be granted "merely to give the defeated party in the circuit court of appeals another hearing."

Magnum Import Co. v. Coty, 262 U. S. 159.

II.

The Merits of the Case.

The facts of the case are fully set out in the opinions of the District Court and the Circuit Court of Appeals, above cited.

As executed and recorded, the deed conveyed "all coal and mineral lying upon and under" the grantors' farm in Pike County, Kentucky. Such a grant is free from ambiguity and under Kentucky law passes title to the oil and gas, as well as to the coal and other minerals.

Scott v. Laws, 185 Ky. 440, 215 S. W. 81.
Maynard v. McHenry, 271 Ky. 642, 113 S. W. (2) 13.
Ky.-W. Va. Gas Co. v. Preece, 260 Ky. 601, 86 S. W. (2) 163.
Fed. Gas, Oil & Coal Co. v. Moore, 290 Ky. 284, 161 S. W. (2) 46.
Hurley v. West Ky. Coal Co., 294 Ky. 96, 171 S. W. (2) 15.
Hudson & Collins v. McGuire, 188 Ky. 712, 223 S. W. 1101.
Slone v. Ky.-W. Va. Gas Co., 289 Ky. 623, 159 S. W. (2) 993.

The provisions of the deed granting the right "of entry to mine said coal, and mineral, with all the usual mining privileges," are not of a restrictive nature, and do not indicate an intention to exclude substances such as oil and gas, or render the deed ambiguous.

Fed. Gas, Oil & Coal Co. v. Moore, supra.
Hurley v. West Ky. Coal Co., supra.
Ky.-W. Va. Gas Co. v. Preece, supra.
Shell Oil Co. v. Dye, (C. C. A. 7) 135 Fed. (2) 365.

The fact that oil or gas had not been discovered in this territory prior to the date of the execution of the deed under consideration, is without significance.

Maynard v. McHenry, supra.
Ky. Diamond Min. & Dev. Co. v. Ky. Transvaal Diamond Co., 141 Ky. 97, 132 S. W. 397.

That it was the intention of the grantors to convey all mineral substances in, and under, the land, is clearly indicated by the reservation in the habendum clause of the deed reading, "reserving to ourselves the fee simple to the surface of said farm."

Fed. Gas, Oil & Coal Co. v. Moore, supra.
Shell Oil Co. v. Manley Oil Corp. (C. C. A. 7) 124 Fed. (2) 714, cer. den. *316 U. S. 690.*
Jividen v. New Pittsburg Coal Co., (Ohio App.) 187 N. E. 124.

The language of the deed as executed and recorded being free of any ambiguity or uncertainty, the deleted words may not be considered in the construction of the instrument.

Kennon v. Shepard, 236 Mass. 57, 127 N. E. 426.
Watson v. Paschall, 93 S. C. 537, 77 S. E. 291.
Remillard Brick Co. v. Remillard-Dandini Co., (Cal App.) 125 Pac. (2) 548.
13 C. J., p. 539, Sec. 505.
17 C. J. S., pp. 734, 735, Sec. 317.

The deed, as recorded, did not disclose the deleted words; the respondent, as a purchaser for value without notice, was entitled to rely upon the verity of the record, and is not affected by the intention of parties to the instru-

ment of which it has no actual notice and which is not expressed in the instrument.

Hudson & Collins v. McGuire, supra.
Phillips v. Big Sandy Co., 149 Ky. 555, 149 S. W. 957.
Cain v. Gray, 146 Ky. 402, 142 S. W. 715.
3 Washburn on Real Property, Sec. 2206.

A mineral deed, like other deeds of conveyance, is strictly construed as against the grantor and in favor of the grantee.

Clark v. Pauley, 291 Ky. 637, 165 S. W. (2) 161.
Franklin Fluorspar Co. v. Hosick, 239 Ky. 454, 39 S. W. (2) 665.
Rudd v. Hayden, 265 Ky. 495, 97 S. W. (2) 35.
Blackburn v. Piney Oil & Gas Co., 278 Ky. 191, 128 S. W. (2) 192.
Hurley v. West Ky. Coal Co., supra.
Kentucky Coke Co. v. Keystone Gas Co., (C. C. A. 6) 296 Fed. 320.

The determination of this cause being governed by Kentucky law, the reasoned judgment of the Circuit Court of Appeals based upon the law of Kentucky, should be followed unless clearly erroneous.

Helvering v. Stuart, 317 U. S. 154, 163.

It is respectfully submitted that the petition for certiorari should be denied.

LeWRIGHT BROWNING,
Counsel for Respondent.